A

Oh Leong Thye v Wong Yoke Kuen & Anor

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(A)-636–04 OF 2016
HAMID SULTAN, ABDUL KARIM AND ASMABI MOHAMAD JJCA
11 MAY 2017

C *Family Law — Matrimonial assets — Division — Whether High Court on granting divorce petition failed to follow provisions of s 76 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA 1976') when ordering division of matrimonial assets — Whether court had to first identify whether a particular asset fell under s 76(1) or s 76(3) or s 76(5) of the LRA 1976 and consider minor*
D *interests under ss 76(2)(c) and 76(4)(b) so that it could make a fair and appropriate order for division of the asset*

The appellant filed for divorce from his wife, the first respondent ('R1'), on the main ground that she had committed adultery with the second respondent
E ('R2') who was her superior at her work-place. During the subsistence of the marriage, the appellant and R1 had acquired, apart from their matrimonial home, two other houses ('property A' and 'property B') in their joint names. R1 had paid RM263,888 towards the redemption of the matrimonial home while the appellant had only paid RM28,080 towards its acquisition. R1 had also
F fully paid for the purchase of property B and contributed 80% (the appellant's contribution was 20%) of the loan amount to acquire property A. The couple also jointly held a RM50,000 fixed deposit ('the FD') in a bank. In his divorce petition, the appellant prayed for: (a) custody of the couple's eight-year-old son, with R1 being given reasonable access to the child; (b) an order that
G property A, property B and the matrimonial home be divided between the appellant and R1 in equal shares; (c) an order that the FD be also divided equally; and (d) R2 to be ordered to pay him general damages for adultery and special damages of RM30,000. In her response to the petition, R1 agreed that the marriage should be dissolved but said custody of the child should be given
H to her and the appellant be allowed reasonable access to him once a week in a public place under her supervision. She said this was because the child had been with her ever since she moved out of the matrimonial home and it was established practice for the appellant to visit the child in her presence. She claimed the entire FD amount was contributed by her and therefore the sum
I should be returned to her. With regard to the matrimonial home, R1 prayed that the appellant be ordered to transfer his half share in the property to her upon her repaying him the RM28,080 he had contributed. She also asked for an order that the appellant transfer his half share in property B to her and that property A be ordered to be sold and the proceeds of sale be divided in the ratio

80%:20% to reflect their respective contributions. After hearing the parties, the High Court ordered the marriage to be dissolved, granted the consequential prayers sought by R1 and dismissed the appellant's claim against R2. In the instant appeal, the appellant appealed against the dismissal of the adultery claim, the manner in which the matrimonial assets were ordered to be divided and the order granting him access to the child in a public place under R1's supervision. With regard to the adultery claim, the High Court held that the circumstantial evidence adduced by the appellant failed to prove the claim beyond reasonable doubt. As to the limited access order, the High Court decided to allow the practice of the appellant visiting the child in R1's presence to continue since he had never objected to the same.

Held, dismissing the appeal against the access order and the dismissal of the adultery claim and amending the orders of the High Court in respect of the division of the matrimonial assets:

(1) There were no merits in the appeal against the issue of access to the child as well as against the dismissal of the adultery claim. The High Court had the benefit of the evidence as well as the demeanour and the conduct of the parties during the period of the marriage. It all related to a finding of facts and, in consequence, appellate intervention was unwarranted (see para 8).

(2) On the issue of division of assets, the High Court had not decided as per the provisions of s 76 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA 1976'). In dealing with matrimonial assets, it was incumbent upon the court to have first identified the category of assets which would have to be dealt with under LRA 1976, in particular, ss 76(1), (3) and (5). In addition, consideration had to be given to minor interests as provided for under ss 76(2)(c) and 76(4)(b) (see paras 9 & 11(a)).

(3) A proper order on the facts of the case in respect of the matrimonial home was to order its sale and that from the purchase price, a sum of RM263,888 be given to R1 (which sum she had paid towards its redemption) and the balance be equally divided. Such an approach would be strictly within the formula set out in s 76(1) of the LRA 1976 and the facts of the case. The High Court should not have considered s 93 of the LRA 1976 when dealing with assets related to s 76(1). If the High Court had ordered the sale of the property, the judge could have reserved a part of the sum for the benefit of the minor child (see para 11(b)).

(4) With respect to property A, the High Court failed to identify under which category the asset should be placed, whether under s 76(1) or s 76(3) of the LRA 1976. Since the property was purchased in the joint names and the mortgage loan was taken under the appellant's name and he was tasked with the liability to settle the loan, a fair and just order was

to order the sale of the property and less redemption sum (if any), the balance purchase price to be equally divided between the parties (see para 12).

(5) With regard to property B, the High Court again failed to identify under which category the asset should be placed. Taking into consideration that property B was in their joint names and the mortgage was in R1's name and that she was paying the instalment payments, the appropriate order was for the sale of the property, less the redemption sum (if any), and from the balance purchase price R1 be paid all sums she had paid towards the instalments and the final balance sum be divided equally between the parties (see para 13).

(6) The RM50,000 fixed deposit fell under s 76(1) of the LRA 1976. An appropriate order on the facts of the case was to order the deposit to be liquidated and the sum with interest to be divided equally between the parties (see para 14).

[Bahasa Malaysia summary

Perayu telah memfailkan perceraian daripada isterinya, responden pertama ('R1'), berhubung alasan utama bahawa dia telah melakukan zina dengan responden kedua ('R2') yang merupakan ketuanya di tempat kerjanya. Sepanjang wujudnya perkahwinan itu, perayu dan R1 telah memperoleh, selain daripada rumah perkahwinan mereka, dua rumah lain, ('hartanah A' dan 'hartanah B') dalam nama bersama mereka. R1 telah membayar RM263,888 untuk penebusan rumah perkahwinan itu manakala perayu telah hanya membayar RM28,080 untuk pengambilalihannya. R1 juga telah dibayar penuh untuk belian hartanah B dan menyumbang 80% (sumbangan perayu adalah 20%) daripada jumlah pinjaman untuk mengambil alih hartanah A. Pasangan tesebut juga telah memegang bersama deposit tetap berjumlah RM50,000 ('DT') dalam sebuah bank. Dalam petisyen perceraiannya perayu telah memohon untuk: (a) hak penjagaan anak lelaki pasangan tersebut yang berumur lapan tahun, dengan R1 diberikan akses yang munasabah kepada anak itu; (b) perintah agar hartanah A, hartanah B dan rumah perkahwinan itu dibahagikan antara perayu dan R1 dalam bahagian yang sama; (c) perintah agar DT itu juga dibahagikan sama rata; dan (d) R2 diperintahkan untuk membayarnya ganti rugi am kerana penzinaan dan ganti rugi khas RM30,000. Sebagai jawapannya kepada petisyen itu, R1 bersetuju bahawa perkahwinan itu patut dibubarkan tetapi hak penjagaan kanak-kanak itu hendaklah diberikan kepadanya dan perayu dibenarkan akses munasabah kepadanya seminggu sekali di tempat awam di bawah pengawasannya. Dia mengatakan ini adalah kerana kanak-kanak itu telahpun bersamanya sejak dia pindah keluar dari rumah perkahwinan itu dan ia adalah amalan tetap untuk perayu untuk melawat kanak-kanak itu dengan kehadirannya. Dia menuntut keseluruhan jumlah DT yang disumbangkan olehnya dan oleh itu jumlah tersebut patut dikembalikan kepadanya. Berkenaan rumah perkahwinan itu, R1 memohon

agar perayu diperintahkan untuk memindahkan separuh daripada bahagian hartanah tersebut kepadanya selepas dia membayarnya balik RM28,080 yang telah disumbangkannya. Dia juga memohon untuk perintah agar perayu memindahkan separuh daripada bahagian hartanahnya dalam hartanah B kepadanya dan bahawa hartanah A diperintahkan untuk dijual dan hasil jualan dibahagikan dalam nisbah 80%:20% untuk menggambarkan sumbangan masing-masing. Selepas perbicaraan pihak-pihak tersebut, Mahkamah Tinggi memerintahkan agar perkahwinan tersebut dibubarkan, dengan memberikan permohonan-permohonan berbangkit yang dipohon oleh R1 dan menolak tuntutan perayu terhadap R2. Dalam rayuan ini, perayu telah merayu terhadap penolakan tuntutan penzinaan itu, Mahkamah Tinggi telah memutuskan bahawa keterangan mengikut keadaan yang dikemukakan oleh perayu telah gagal untuk membuktikan tuntutan melampaui keraguan munasabah. Berhubung perintah akses terhad, Mahkamah Tinggi telah memutuskan untuk membenarkan amalan perayu melawat kanak-kanak itu dengan kehadiran R1 berterusan memandangkan dia tidak pernah membantah perkara tersebut.

Diputuskan, menolak rayuan terhadap perintah akses dan penolakan tuntutan penzinaan dan meminda perintah-perintah Mahkamah Tinggi berkaitan pembahagian aset-aset perkahwinan:

(1) Tiada merit dalam rayuan terhadap isu akses kepada kanak-kanak itu dan juga terhadap penolakan tuntutan penzinaan itu. Mahkamah Tinggi mendapat manfaat daripada keterangan itu dan juga sikap dan kelakuan pihak-pihak sepanjang tempoh perkahwinan itu. Ia kesemuanya berkaitan dengan penemuan fakta dan, akibatnya, campur tangan rayuan adalah tidak wajar (lihat perenggan 8).

(2) Berhubung isu pembahagian aset-aset, Mahkamah Tinggi tidak membuat keputusan sepertimana peruntukan s 76 Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 ('APUPP 1976'). Dalam mengendalikan aset-aset perkahwinan, ia adalah kewajipan mahkamah untuk terlebih dahulu mengenal pasti kategori aset-aset yang perlu dikendalikan di bawah APUPP 1976, khususnya, ss 76(1), (3) dan (5). Tambahan pula, balasan perlu direka kepada kepentingan kecil sepertimana diperuntukkan di bawah ss 76(2)(c) dan 76(4)(b) (lihat perenggan 9 & 11(b)).

(3) Perintah yang wajar berhubung fakta kes berkaitan rumah perkahwinan adalah untuk memerintahkan jualannya dan yang daripada harga belian, sejumlah RM263,888 diberikan kepada R1 (jumlah yang telah dibayarnya untuk penebusannya) dan baki dibahagikan sama rata. Pendekatan sebegini adalah menurut formula yang ditetapkan dalam s 76(1) APUPP 1976 dan fakta kes itu. Mahkamah Tinggi tidak patut mempertimbangkan s 93 APUPP 1976 apabila mengendalikan aset-aset yang berkaitan dengan s 76(1). Jika Mahkamah Tinggi telah

memerintahkan jualan hartanah itu, hakim mungkin telah merizabkan sebahagian daripada jumlah itu untuk faedah kanak-kanak kecil itu (lihat perenggan 11(b)).

(4) Berhubung hartanah A, Mahkamah Tinggi telah gagal untuk mengenal pasti di bawah kategori mana aset itu patut diletakkan, sama ada di bawah s 76(1) atau 76(3) APUPP 1976. Oleh kerana hartanah itu telah dibeli atas nama bersama dan pinjaman gadai janji telah diambil di bawah nama perayu dan dia telah dipertanggungjawabkan dengan liabiliti untuk menyelesaikan pinjaman itu, perintah yang adil dan saksama adalah untuk memerintahkan jualan hartanah itu dan kurang jumlah penebusan (jika ada), baki harga belian dibahagikan sama rata antara pihak-pihak (lihat perenggan 12).

(5) Berhubung hartanah B, Mahkamah Tinggi sekali lagi telah gagal untuk mengenal pasti kategori mana aset itu patut diletakkan. Dengan mengambil kira bahawa hartanah B adalah atas nama bersama mereka dan gadai janji adalah atas nama R1 dan bahawa dia yang membayar bayaran ansuran, perintah yang sesuai adalah untuk jualan hartanah itu, kurang jumlah penebusan (jika ada), dan daripada baki harga belian R1 dibayar untuk semua jumlah yang telah dibayarkannya untuk ansuran-ansuran tersebut dan jumlah baki akhir dibahagikan sama rata antara pihak-pihak (lihat perenggan 13).

(6) Deposit tetap berjumlah RM50,000 terjatuh di bawah s 76(1) APUPP 1976. Perintah yang sesuai berdasarkan fakta kes adalah untuk memerintahkan deposit dilikudasikan dan jumlah itu bersama faedah dibahagikan sama rata antara pihak-pihak (lihat perenggan 14).]

Notes

For cases on division of matrimonial assets, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4674–4688.

Cases referred to

Chan Beng Tiow v Kok Mei Mooi [2005] 3 MLJ 719, CA (refd)
Clarke v Edinburgh and District Tramways Co 1919 SC (HL) 35, HL (refd)
Karthiyan a/p Naidu v Amuthan a/l Arumugam [2011] 1 LNS 997, HC (refd)
Koay Cheng Eng v Linda Herawati Santoso [2008] 4 MLJ 863, CA (refd)
Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2013] 2 MLJ 650, CA (refd)
N (F) v C [1997] 3 MLJ 855, HC (refd)
Phua Beng Hong v Ho Shik Ho [2000] 2 MLJ 289, CA (refd)
Sivanes a/l Rajaratnam v Usha Rani a/p Subramaniam [2002] 3 MLJ 273, CA (refd)
Watt (Or Thomas) v Thomas [1947] 1 All ER 582; [1947] AC 484, HL (refd)
Yap Yen Piow v Hee Wee Eng [2017] 1 MLJ 17, CA (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 76, 76(1), (2)(c), (3), (4)(b), (5), 93

Appeal from: Divorce Petition No 33–119–03 of 2014 (High Court, Shah Alam)

Tee Kuo Ying (Hisham Yoong & KC Lim) for the appellant.
Dhyana Shila (Dhyan & Co) for the first respondent.
K Bharathi (Kamarudin Yusof & Assoc) for the second respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant/petitioner in this appeal, appeals against the decision of the learned judicial commissioner limited to three grounds as per the submission. The three grounds are as follows:

(a) division of matrimonial assets;

(b) access right to the child; and

(c) adultery claim against the second respondent.

[2] The orders made by the High Court, inter alia, read as follows:

(a) Hak kawalan, penjagaan dan pemeliharan Leo Oh Qin Yau (No Surat Beranak: CA 73965) diberikan kepada responden pertama dengan akses munasabah kepada pempetisyen untuk melawat anak tersebut di tempat awam dan akses tersebut akan dan perlu di bawah pengawasan responden pertama;

(b) Hartanah A iaitu sebuah rumah dua tingkat yang mempunyai alamat No 2, Jalan Setia Perdana U13/25C, Ayur Prima, Setia Alam, Selangor Darul Ehsan tersebut dijual pada harga pasaran dan hasil jualan hartanah A dibahagikan antara responden pertama dan pempetisyen dalam nisbah 80% kepada responden pertama dan 20% kepada pempetisyen masing-masing;

(c) Pempetisyen memindahmilik setengah (1/2) bahagian hartanah B iaitu sebuah rumah 'semi-detached' yang mempunyai alamat di No 8, Jalan Menteri U1/85, Temasya Glenmarie, Selangor Darul Ehsan tersebut yang dipegang olehnya kepada responden pertama dan menandatangani kesemua dokumen-dokumen pindahmilik dan dokumen samping dalam masa 30 hari daripada tarikh perintah ini dimana kos untuk pindahmilik akan ditanggung oleh Responden Pertama;

(d) Responden pertama membayar balik wang sejumlah RM28,080.00 yang telah dibayar oleh Pempetisyen untuk hartanah C iaitu rumah perkahwinan yang mempunyai alamat di No 13, Jalan Cecawi 6/31 A, Kota Damansara, 47810 Petaling Jaya, Selangor dalam tempoh 60 hari

dari tarikh perintah ini dan pempetisyen memindahmilik setengah (1/2) bahagian yang dipegang olehnya kepada responden pertama dalam tempoh 30 hari setelah pembayaran penuh dibayar oleh responden pertama kepada pempetisyen dan kos pindahmilik 1/2 bahagian yang dipegang oleh pempetisyen ditanggung oleh pihak secara bersama. Pempetisyen juga diperintahkan mengosongkan hartanah C dalam tempoh 60 hari dari tarikh perintah ini;

(e) Wang berjumlah RM50,000.00 yang telah dimasukkan ke dalam simpanan deposit tetap Maybank di bawah nama pempetisyen dan responden pertama bersama dengan nombor akaun: 212754100216 adalah kepunyaan kepada responden pertama sepenuhnya;

(f) Tuntutan pempetisyen di perenggan (f) petisyen perceraian ditolak.

[3] The brief facts of the case as summarised before us and to save courts time, we repeat the same. It reads as follows:

Brief Facts

1. The petitioner (husband) and the first respondent (wife) were married on 30 May 2004. They have one child named Leo Oh Qin Yao, born on 20 July 2008 and currently eight years old. The child is currently with the first respondent.

2. They had acquired one matrimonial property at Kota Damansara, Petaling Jaya ('property c'). The petitioner owned his own business known as IDM Creative Marketing Sdn Bhd with a monthly salary of RM6,000.

3. The first respondent is the Group General Manager of Compugates Holding Bhd. The second respondent is the Managing Director of Compugates Holding Bhd and is the boss of the first respondent.

4. The marriage broke down around 2010 since the petitioner alleged that the first respondent had committed adultery with the second respondent.

5. The petitioner and first respondent referred the dispute to the marriage tribunal on 21 January 13 and it was concluded that the marriage could not be reconciled and a certificate dated 13 May 13 was issued to this effect.

6. In September 2013, the first respondent moved out from the matrimonial house with her son, in the presence of the petitioner, petitioner's brother and wife, and the first respondent's sister.

7. During the marriage, the couple had property acquired in joint names at Setia Alam, Shah Alam ('property A') and Temasya Glenmarie, Selangor ('property B').

8. Therefore, the petitioner prays for the following against the first respondent:

(a) the marriage between the petitioner and the first respondent be dissolved;

(b) the custody of the child be given to the petitioner;

(c) the first respondent be given reasonable access to the child;

(d) the properties acquired (property A, B and C) to be distributed in equal shares;

(e) the fix deposit in Malayan Banking Bhd (No 212754100216) to be distributed in equal shares;

(f) all the items at the safe deposit box (Box Number 2010C) at Public Bank Bhd be distributed in equal shares; and

(g) costs.

9. The petitioner also claimed against the second respondent for general damages for adultery, special damages of RM30,000 and costs.

10. The first respondent in her reply to the petition had prayed for the following:

(a) the marriage between the petitioner and first respondent be dissolved;

(b) the custody of the child be given to the first respondent and the petitioner be given reasonable access on every Sunday of the week for two hours from 10.30am–12.30pm in a public place, and the first respondent to accompany the child during this meet;

(c) the deposit sum of RM50,000 in Malayan Banking Bhd under the joint name of the petitioner and the first respondent be lifted, and the sum be returned to the first respondent;

(d) the property A be sold at the market price, and the proceed thereon be channelled to refund the payment made by the petitioner and the first respondent respectively for the purchase of the house until the date of sale, and the remaining sum to be distributed to the first respondent and the petitioner in the ratio of 80%:20%;

(e) the petitioner to transfer to the first respondent his 1/2 shares in property B and to execute the memorandum of transfer and all other relevant documents relating to transfer in favour of the first respondent within 30 days from the date of the order, and the first respondent to borne the charges for the transfer;

(f) the first respondent refund the petitioner the sum paid by the petitioner for the purchase of 1/4 of the shares of the matrimonial house (property C) within 60 days from the order, and the petitioner to transfer his 1/2 share to the first respondent within 30 days from the date he receive full payment from the first respondent; and

(g) the costs of the petition to be borne by the petitioner.

11. The second respondent prays for the divorce petition to be dismissed with costs.

12. According to statement of agreed facts between the petitioner and the first respondent, it is agreed as follows:

(a) both the petitioner and the first respondent are the registered owners of property A, B and C;

(b) both the petitioner and the first respondent have a fixed deposit account in Maybank with the amount of RM50,000 deposited in it;

(c) for property a, the petitioner contributed 20% of the loan amount whereas the first respondent had contributed 80% of the loan amount;

(d) the first respondent had fully contributed in purchasing property B; and

(e) the first respondent had paid the redemption sum to redeem their matrimonial house (property C).

13. After hearing the parties, the judge made the following orders:

(a) the marriage between the petitioner and the first respondent be dissolved;

(b) the custody of the child be given to the first respondent and the petitioner be given reasonable access to the child in a public place and the access under the supervision of the first respondent;

(c) the property A be sold at the market price, and the proceed thereon be distributed to the first respondent and the petitioner in the ratio of 80% to the first respondent and 20% to the petitioner;

(d) the petitioner to transfer to the first respondent his 1/2 shares in property B and to execute the memorandum of transfer and all other relevant documents relating to transfer in favour of the first respondent within 30 days from the date of the order, and the first respondent to borne the charges for the transfer;

(e) the first respondent repays the petitioner RM28,080 being the sum paid by the petitioner for the purchase of the matrimonial house (property C) within 60 days from the order, and the petitioner to transfer his 1/2 share to the first respondent within 30 days from the date he receive full payment from the first respondent. The costs to transfer the 1/2 shares of the petitioner to the first respondent to be borne equally by the petitioner and the first respondent;

(f) the deposit sum of RM50,000 in Malayan Banking Bhd under the joint name of petitioner and the first respondent is belonging to the first respondent;

(g) the petitioner's prayer in prayer (f) of the petition for the equal distribution of items in safe deposit at the Public Bank is dismissed;

(h) both the petitioner and the first respondent to bear their own costs; and

(i) the petitioner's claim against second respondent is dismissed with costs of RM5,000. A

14. Dissatisfied with part of the order, the petitioner filed appeal herein.

[4] The learned judicial commissioner had given her reasons for dismissing the adultery claim against the second respondent. It was summarised before us as follows: B

Adultery

1. An allegation of adultery must be proved beyond reasonable doubt by the husband. Where the evidence is entirely circumstantial, the court will not draw the inference of guilt unless the fact relied on are not reasonably capable of any other explanation. The court have to consider the weight to be given to the united force of all the circumstances put together. C D

2. The court observed that:

(a) the multimedia messages of 'I Love you' sent by the second respondent to the first respondent does not amount to adultery. The petitioner could not prove that the second respondent had sent message to the first respondent stating that he wants to have sex with her; E

(b) the issue of the first respondent having the second respondent's Genting Highland's membership card in her hand bag does not mean that they are having an adulterous relationship; F

(c) the issue of the first respondent was allowed to work from home by the second respondent is not an adultery;

(d) the huge increment given to the first respondent by the second respondent is not because of adulterous relationship, but because of her performance and the second respondent had also increased the salary of all his other staffs as well; G

(e) the purchase of Rolex watch and Honda CRV in cash by first respondent does not amount to adultery. The first respondent is capable of buying her car and other necessities in cash; H

(f) the petitioner appointed a private investigator on the first respondent after she moved out from the matrimonial house. The private investigator had made observation at the apartment where the first respondent lived after moving out from the matrimonial house. Both the respondents were seen to be in the apartment from two to four hours, but it is in the day time and not at the night time. And usually the second respondent was seen to wear office attire, ie white shirt, dark pants and a red tie; and I

(g) the petitioner alleged that the first respondent inserted the IUCD in the year 2010 to ensure that she would not conceive while having an

adulterous relationship with the second respondent. The court observed that the doctor called to testify had confirmed that it was a replacement of the IUCD in the year 2010, to replace the earlier inserted IUCD in the year 2008, right after she delivered the child of the marriage. This is for the reason of family planning which is known to the petitioner. Therefore, this does not suggest adultery.

3. The circumstantial evidence in this case does not prove that the offence of adultery was performed by the first and the second respondent. Therefore, the claim for damages for adultery against the second respondent is dismissed.

4. Since both the appellant and the first respondent does not want to remain in the marriage, the marriage is dissolved.

[5] The learned judicial commissioner had given reasons for the limited access order. It was summarised before us as follows:

Custody and access

1. The appellant does not appeal against the custody given to the first respondent. He is only appealing against the decision of this court in granting access to the child with the supervision of the first respondent in a public place.

2. The child was with the first respondent ever since the first respondent moved out from the matrimonial house. Ever since, the petitioner would visit the child in the presence of the first respondent. Therefore, the court's order is continuation of the norm in which the petitioner had never objected to the same.

[6] The learned judicial commissioner had given her reasons for distribution of the assets. It was summarised before us as follows:

Matrimonial House — Property C

1. This property was bought in the year 2004. The petitioner and respondent equally contributed towards the deposit by withdrawing from EPF. The copule applied for a loan to finance the property and paid the monthly instalment equally.

2. The appellant contended that he had forked out RM70,000 for renovation works by referring to a receipt and invoices, and therefore refused to transfer his 1/2 shares in the house to the first respondent. The court found that those documents were not addressed to the petitioner and there was overlapping amounts. The appellant failed to prove that RM70,000 referred therein is used for renovation works.

3. The first respondent then sold another property that she had bought for personal investment and redeem property C from the bank.

4. The petitioner agreed to repay his 1/4 share of property C by paying instalments of RM780 per month. The petitioner continued his payment

only up to June 2014 and the petitioner stopped the payment effective from July 2014, but continued to live in property C till the date of the hearing.

5. The first respondent had moved out with her child and rented an apartment at D'Rimba Damansara. She paid the rental of the apartment. Though the petitioner invited the first respondent to stay in property C, in different rooms, pending resolution of divorce petition, the first respondent refused to do so since the petitioner and the first respondent do have quarrels all the time and this is not good for the wellbeing of the child.

6. Therefore, the court considered the payment of RM780 a month made by the petitioner up to June 2014 as contra payment for the rental of the apartment by first respondent to live with her children, from the time they moved out from the matrimonial house.

7. As a husband, the petitioner is responsible to fund and provide the residence and maintenance to the first respondent and the children pending resolution of the divorce petition. This is provided under s 92 of the Act.

8. Though the petitioner earns less than the first respondent, the petitioner is still obliged to provide maintenance to the first respondent and the children from the marriage.

9. Therefore, it is ordered that the first respondent repays the petitioner RM28,080 being the sum paid by the petitioner for the purchase of the matrimonial house (property C) within 60 days from the order, and the petitioner to transfer his 1/4 share to the first respondent within 30 days from the date he receive full payment from the first respondent. The costs to transfer the 1/4 shares of the petitioner to the first respondent to be borne equally by the petitioner and the first respondent. The petitioner to provide vacant possession of property C within 60 days from the date of the order.

Property A — House at Setia Alam, Selangor

1. The law on distribution of property upon a divorce is clear, in which it will be distributed in accordance with the contribution of each parties.

2. Therefore, the property A is ordered to be sold and after deducting the liabilities, the proceeds of sale should be distributed in the ratio of 20% to the appellant and 80% to the first respondent, in accordance with their contribution.

Property B — House at Glenmarie, Selangor

1. This property was purchased on 4 April 2012 in the joint name of the petitioner and the first respondent. The first respondent loaned from Maybank Islamic Bhd to finance the purchase. The first respondent had made payment for quit rent, assessment and other payments. The monthly instalment was paid by the first respondent to date.

2. The petitioner agreed that he did not contribute in purchasing the property. But the appellant insist that he be given 1/4 share from this property since the petitioner was responsible to search and identify the property for investment purpose, and deal with the developer and the bank.

3. The first respondent denied the same and stated that it is her friends who identified the property and informed her.

4. The petitioner's contention was not supported by any document/exhibits.

5. Therefore, the petitioner is ordered to transfer to the first respondent his 1/2 shares in property B and to execute the memorandum of transfer and all other relevant documents relating to transfer in favour of the first respondent within 30 days from the date of the order.

Fix deposit of RM50,000

1. Both parties agreed that the account is opened under their joint names. The sum of RM50,000 was deposited to secure the finance to purchase property A.

2. Nevertheless, the first respondent manage to prove to the court that the sum was taken out from her own personal fix deposit at Public Bank and thereafter placed in fixed deposit in joint names in Public Bank. That sum thereafter transferred to the fix deposit account at Maybank.

3. Therefore, it is clear that the sum deposited in the Maybank under joint names was properly belonged to the first respondent. Therefore, the petitioner's claim to claim 1/4 of the said sum is dismissed.

[7] The appellant's complaint in respect of his appeal and division of assets is set out in the memorandum of appeal. We do not wish to repeat the lengthy memorandum of appeal as well as the additional memorandum of appeal.

[8] After having read the submission of the parties on the issue of access and adultery, we do not find any merits on the appeal. The learned judge had the benefit of the evidence as well as demeanour and the conduct of parties during the period of marriage. It all relates to finding of facts and in consequence appellate intervention is unwarranted (see *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; *Watt (Or Thomas) v Thomas* [1947] 1 All ER 582; [1947] AC 484; *Clarke v Edinburgh and District Tramways Co* 1919 SC (HL) 35).

ASSETS

[9] On the issue of division of assets, we take the view that the learned judicial commissioner had not decided as per the provision of s 76 of the Law Reform (Marriage and Divorce) Act 1976. Quite recently, the Court of Appeal in the case of *Yap Yen Piow v Hee Wee Eng* [2017] 1 MLJ 17 had dealt with s 76

in detail. We gave an opportunity for the parties to submit further submission based on the decision of that case and we reserved judgment. The final submissions were received in late January though the matter was heard on 28 November 2016.

[10] The learned counsel for the appellant has summarised some of the observations of the Court of Appeal in *Yap Yen Piow*'s case as follows:

3. In *Yap Yen Piow*'s case, the honourable Court of Appeal held that:

(1) If Parliament had intended that all assets which were acquired during the marriage ought to be divided, it would have clearly done so. It was not for the court to fill any gap in the law and construct the provisions of the Law Reform (Marriage and Divorce) Act 1976 by widening the scope of relief based on other jurisdictions which did not have pari materia provisions.

(2) The division of matrimonial property — which related to property acquired by the joint efforts of the spouses and fell under s 76(1) of the Act — was permissible as of right. But for non-matrimonial property — ie property acquired through the sole effort of one spouse and fell under s 76(3) of the Act or property which fell under s 76(5) — the division was not permissible as of right unless the Act clearly said so or provided for a methodology to do so. The court had a discretion to deal with non-matrimonial property justly.

4. The honourable Court of Appeal has classified matrimonial assets into two categories as follows:

One is *matrimonial property which will fall* under s 76(1) and the other is *non-matrimonial property* which will fall *under s 76(3) and/or (5) of the LRA 1976*. Whether it is a matrimonial or non-matrimonial property, both will fall under the caption of matrimonial assets.

5. The honourable Court of Appeal judges further distinguished matrimonial property and non-matrimonial property by efforts of spouse towards the acquisition:

The classification of *matrimonial property will relate to property acquired by joint efforts* of the spouse, (see s 76(1) of the LRA 1976). *Non-matrimonial property will relate to property acquired through the sole effort of one spouse* (see s 76(3) of the LRA 1976).

6. It must be noted that joint efforts need not necessarily be in monetary terms but should include consideration in kind:

When it relates to matrimonial property (or home) ie the house (or more than one) and all movable and immovable assets in the house or having nexus to the house, such as a car, etc which is meant to be used by the family, the courts have generally acknowledged that it falls under matrimonial property which will fall under s 76(1) of the LRA 1976, provided it was acquired *by the joint efforts of the spouses though one spouse may not have contributed in cash but the consideration may have been in kind.*

7. The honourable Court of Appeal subsequently introduced a nexus test to be applied in determining the issue of matrimonial property:

> *The nexus appears to be the enjoyment and use. If there is no enjoyment and/or use for current common purpose, it will appear the nexus test may not be satisfied.* In this respect, future funds such as EPF, insurance, pension, etc. may not fall in this category.

8. In the division of matrimonial assets, the law on division of matrimonial property is well settled as stipulated in section 76(2) of the LRMDA 1976,whereby the court shall incline towards the equality subject to statutory considerations. However the division of non-matrimonial asset is on discretion of the court subject to statutory considerations under section 76(4) of the LRMDA 1976:

> *When it relates to matrimonial property, the division of the assets is a well recognised principle in Malaysia.*
>
> However, when the assets fall under the category of non-matrimonial property, the division is not permissible as of right unless the Act clearly says so or provides for a methodology to do so. That is to say, for matrimonial property, the division is of right but *non-matrimonial property the division is not as of right.*

[11] We have read the appeal record and the able submissions of the counsel. After having given much consideration to the submission of the learned counsel for the parties, we take the view that the appeal should be allowed partly in respect of division of assets only. Our reasons, inter alia, are as follows:

(a) in dealing with matrimonial assets, it is incumbent upon the court first to identify the category of assets which will have to be dealt under the LRA 1976, in particular: (i) s 76(1); (ii) s 76(3); and (iii) s 76(5). In addition, we must take into consideration the minor interest as provided for under ss 76(2)(c) and 76(4)(b). The said s 76 of the LRA 1976 reads as follows:

> 76 Power for court to order division of matrimonial assets
>
> (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.
>
> (2) In exercising the power conferred by subsection (1) the court shall have regard to —
>
> (a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;
>
> (b) any debts owing by either party which were contracted for their joint benefit;
>
> (c) the needs of the minor children, if any, of the marriage, and

subject to those considerations, the court shall incline towards equality of division.

(3) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

(4) In exercising the power conferred by subsection (3) the court shall have regard to —

(a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;

(b) the needs of the minor children, if any, of the marriage; and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion.

(5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

MATRIMONIAL ASSETS

Property C

It is not in dispute that property C is the matrimonial property where both the appellant and the first respondent were staying. The said property is also in both their names. It is also not in dispute that the first respondent paid the redemption sum RM263,888. A proper order on the facts of the case will be to order the sale of property C and from the purchase price a sum of RM263,888 to be given to the first respondent and the balance to be equally divided. Such an approach will be strictly within the formula set out in s 76(1) of the LRA 1976 and the facts of the case. The learned judicial commissioner ought not to have considered s 93 of the LRA 1976 when dealing with assets related to s 76(1). If the learned judicial commissioner had ordered the sale of the property, the judge could have reserved a part of the sum for the benefit of the minor child. Taking a holistic approach on the facts of the case, we take the view that the appellant's submission and reliance of the following cases has merits. They are as follows: (a) *Karthiyan a/p Naidu v Amuthan a/l Arumugam* [2011] 1 LNS 997; (b) *Koay Cheng Eng v Linda Herawati Santoso* [2008] 4 MLJ 863; (c) *Chan Beng Tiow v Kok Mei Mooi* [2005] 3 MLJ 719; and (d) *N (F) v C* [1997] 3 MLJ 855.

Property A

[12] It is not in dispute that property A was purchased in the joint names. However, the mortgage loan for property A was taken under the appellant's name. The learned judicial commissioner had failed to identify under which category the assets should be placed, whether under s 76(1) or s 76(3) of the LRA 1976. Since the property is in the joint names and the appellant is tasked with the liability to settle the loan, we take the view that a fair and just order will be to order the sale of the property and less redemption sum (if any) the balance purchase price to be equally divided between the parties.

Property B

[13] It is also not in dispute that property B was purchased on the joint names. However, the mortgage loan was under the first respondent's name and by agreement she was the one paying the instalments. The learned judicial commissioner had failed to identify under which category the assets should be placed. Taking into consideration that the property is in the joint name and the mortgage is in the name of the first respondent and the first respondent by agreement has been paying the instalment sums and appropriate order will be for the sale of the property less the redemption (if any) and from the balance purchase price, to pay the first respondent all sums that she had paid towards instalments and the final balance sum to be divided equally between the parties (see *Sivanes a/l Rajaratnam v Usha Rani a/p Subramaniam* [2002] 3 MLJ 273; *Phua Beng Hong v Ho Shik Ho* [2000] 2 MLJ 289).

Joint fixed deposit account

[14] It is not in dispute that the sum of RM50,000 was acquired during the subsistence of the marriage. In addition, it is in the joint name of the parties. The said sum will fall within the meaning of assets under s 76(1) of the LRA 1976. An appropriate order on the facts of the case is to order the deposit to be liquidated and the sum with interest to be divided equally between the parties.

[15] For reasons stated above, we take the view that the orders of the High Court to be amended in respect of property A, B and C as well as the joint fixed deposit to be read as follows:

Property A

Hartanah A iaitu sebuah rumah dua tingkat yang beralamat di No 2, Jalan Setia Perdana U13/25C, Ayer Prima, Setia Alam, Selangor Darul Ehsan tersebut hendaklah dijual dan setelah menolak penyata baki hutang (*redemption sum*), baki akhirnya hendaklah dibahagikan sama rata kepada perayu dan responden pertama.

Property B

Hartanah B iaitu sebuah rumah 'semi-detached' yang beralamat di No 8, Jalan

Menteri U1/85, Temasya Glenmarie, Selangor Darul Ehsan tersebut hendaklah dijual dan setelah menolak penyata baki hutang (jika ada), baki selepas penolakan hendaklah digunakan untuk membayar kesemua bayaran ansuran bulanan (*monthly instalment*) yang telah dibayar oleh responden pertama dan baki akhirnya hendaklah dibahagikan sama rata kepada perayu dan responden pertama.

Property C

Hartanah C iaitu rumah perkahwinan yang beralamat di No 13, Jalan Cecawi 6/31A, Kota Damansara, Petaling Jaya, Selangor Darul Ehsan tersebut hendaklah dijual dan harga jualannya (*purchase price*) hendaklah digunakan untuk membayar sebanyak RM263,888 kepada responden pertama dan baki akhirnya hendaklah dibahagikan sama rata kepada perayu dan responden pertama.

Joint Fixed Deposit

Wang berjumlah RM50,000 dalam simpanan deposit tetap Maybank di bawah nama perayu dan responden pertama di bawah akaun: 212754100216 hendaklah dibahagikan sama rata kepada perayu dan responden pertama.

[16] We make no order as to costs. Deposit is to be refunded.

We hereby order so.

Appeal dismissed against access order; adultery claim dismissed; orders of the High Court amended.

Reported by Ashok Kumar